No. 88-1426

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

v. *Petitioner,*

HAROLD JACKSON AND OTIS PETERSON AND THE DISTRICT COURT OF IOWA IN AND FOR MONONA COUNTY,

Respondents.

* * * *

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v. *Petitioner,*

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY; JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; OTIS PETERSON; DARRELL L., HAROLD, AND LUEA SORENSON; STATE OF IOWA AND IOWA DEPARTMENT OF NATURAL RESOURCES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents State of Iowa and the Iowa Department of Natural Resources respectfully oppose the Petition of the Omaha Indian Tribe for a Writ of Certiorari to review the opinion of the Court of Appeals for the Eighth Circuit entered on August 12, 1988.

OPINIONS BELOW

There are nine reported opinions in this litigation, an unreported order of the Court of Appeals, and the District Court's unreported Final Judgment and Decree dated May 29, 1987 (Pet. App. p. 16a), which was amended by Order dated June 30, 1987 (Pet. App. p. 31a).

The opinions and orders, in chronological order, are as follows: *United States v. Wilson*, 433 F.Supp. 57 (N.D. Iowa 1977) (memorandum and opinion) [*Blackbird Bend I*] (Pet. App. p. 189a); *United States v. Wilson*, 433 F.Supp. 67 (N.D. Iowa 1977) (findings of fact) [*Blackbird Bend I*] (Pet. App. p. 205a); *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978) [*Omaha I*] (Pet. App. p. 135a); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (Pet. App. p. 107a); *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980), *cert. denied* 449 U.S. 825 (1980) [*Omaha II*] (Add. p. A-1); *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa 1981) [*Blackbird Bend II*] (Pet. App. p. 52a); *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982), *cert. denied* 465 U.S. 1025 (1984) [*Omaha III*] (Pet. App. p. 92a); *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984) [*Blackbird Bend III*] (Pet. App. p. 5a); *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988) [*Omaha IV*] (Pet. App. p. 37a); *In Re: Omaha Indian Tribe*, No. 86-1717 (8th

(Pet. App. p. 461a); Final Judgment and Decree entered May 29, 1987 (Pet. App. p. 16a); Order entered June 30, 1987 (Pet. App. p. 31a).

The Court of Appeals and the parties have referred to the four decisions of the Court of Appeals as *Omaha I, II, III,* and *IV*. The three decisions of the trial court have been referred to as *Blackbird Bend I, II,* and *III*.

JURISDICTION

The Court of Appeals for the Eighth Circuit entered its opinion on August 12, 1988. (Pet. App. p. 37a). A petition for rehearing en banc was denied on November 10, 1988 (Pet. App. p. 49a), and the Tribe's Petition for Writ of Certiorari was filed within the time period as extended by this court by order of January 18, 1989 (Pet. App. p. 50a). The Petition invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

United States Code, Title 25 Section 194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

STATEMENT OF THE CASE

The Omaha Indian Tribe seeks review of a decision of the Court of Appeals for the Eighth Circuit finally resolving the ownership of lands along the Missouri River in Iowa. *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988) (*Omaha IV*) (Pet. App. p. 37a). In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (Pet. App. p. 107a), this Court addressed the applicability of 25 U.S.C. § 194 to this accretion - avulsion dispute. Although holding that 25 U.S.C. § 194 placed the burden of persuasion on private defendants to establish ownership of the area previously within the reservation, this Court held that section 194 did not apply to the Tribe's claims against the State.

After *Wilson*, the Court of Appeals held that private defendants failed to overcome the presumption of title imposed by section 194 as to "trust lands" – lands which were within the reservation when the river movements occurred. *Omaha II* (Add. p. A-17). The final judgment quiets title in the United States as trustee for the Tribe to these 1900 acres.

The trier of fact found that, absent the benefit of section 194, the Tribe failed to prove that the river moved west by avulsions, an essential predicate to its claim that it owns this land on the Iowa side of the river. The Tribe therefore lost as to the lands claimed by the State and also as to the area which had been conveyed out of trust (the "fee patent lands"). *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984) (*Blackbird Bend III*) (Pet. App. p. 5a), *aff'd Omaha IV* (Pet. App. p. 37a).

The United States as trustee for the Omaha Indian Tribe filed suit on May 19, 1975, seeking to quiet title to

approximately 2900 acres of land located in Iowa adjacent to the Missouri River in Blackbird Bend. (Pet. App. p. 263a). The government claimed the land was formerly part of the Omaha Indian Tribe Reservation as surveyed by T. H. Barrett in 1867. On October 6, 1975, the Omaha Indian Tribe filed its own petition seeking to quiet title to the same area and to an additional 3490 acres in Blackbird Bend. (Pet. App. p. 269a). After the suits were consolidated at the Tribe's request, the District Court severed that portion of the Tribe's suit which concerned land outside the Barrett Survey. Order of January 26, 1976 (Pet. App. pp. 395a, 401a); Order of April 5, 1976 (Pet. App. pp. 403a-405a).

The Tribe claims ownership of the land east of the Missouri River on the theory that this land was long ago cut off from the Tribe's west bank reservation by a series of avulsions. The State and private defendants presented evidence that the river moved by accretion. After trial, the District Court found that the river moved west by accretion and entered judgment for the defendants. *Blackbird Bend I* (Pet. App. pp. 205a, 242a-243a). The Court of Appeals reversed, concluding that federal law applied and that 25 U.S.C. § 194 shifted the burden of persuasion to all defendants. *Omaha I* (Pet. App. pp. 135a, 151a-155a).

This Court reversed, holding that federal law should borrow Nebraska property law. *Wilson v. Omaha Indian Tribe* (Pet. App. pp. 107a, 132a). This Court agreed that the Tribe could establish prior possession or ownership for purposes of 25 U.S.C. § 194 by showing that the *area* within the Barrett Survey was in the reservation prior to the river movements. (Pet. App. p. 123a). However, this Court held that the State of Iowa was not a "white

person" and could not be handicapped by the application of 25 U.S.C. § 194. (Pet. App. pp. 121a-122a, 132a).[1]

On remand the Court of Appeals determined that the private defendants did not meet their burden of persuasion to overcome the Tribe's presumption of ownership under 25 U.S.C. § 194. *Omaha II* (Add. p. A-17). While the Court of Appeals concluded that the Tribe's evidence of avulsive chute or neck cut-offs did not equally balance the defendants' proof, it held that section 194 precluded any consideration of inferences drawn from these and other weaknesses in the Tribe's proof of avulsions. (Add. p. A-17). The Court specifically excepted the State of Iowa from its holdings. (Add. pp. A-17-A-18). The Tribe's claim against the State was severed and remanded to allow the Tribe "to point out specific evidence relied upon to show avulsions on the particular land claimed by the State." (Add. p. A-18).

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[1] The Petition erroneously states that in *Wilson* this Court upheld the "Tribe's assertion that Respondents had the burden of proof pursuant to 25 U.S.C. § 194." (Pet. p. 3, n.6). The Tribe further claims that this Court's decision "affirmed the Opinion of the Court of Appeals, applying 25 U.S.C. § 194." (Pet. p. 3, n.6). In fact, this Court vacated the opinion of the Court of Appeals in *Omaha I* on several grounds. First, this Court held that the State of Iowa was not a "white person" for purposes of 25 U.S.C. § 194 and that 25 U.S.C. § 194 did not apply to the State. (Pet. App. pp. 121a, 132a). Second, this Court held that the Court of Appeals erred in "arriving at a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion." (Pet. App. pp. 126a-127a, 132a). The Court of Appeals' judgment was vacated and remanded for further proceedings. (Pet. App. p. 132a).

Although the District Court concluded that the evidence established that the river moved by accretion at all critical times, it held that the Court of Appeals' findings applying a different burden of proof conclusively determined, as against the State, that the Tribe owned eastern trust lands and all accretions. (Pet. App. pp. 83a-84a). Although the Tribe had never proved its avulsions against the State, the District Court quieted title in the plaintiffs to the entire Barrett Survey area. *Blackbird Bend II* (Pet. App. pp. 83a-84a).

The Court of Appeals reversed. *Omaha III* (Pet. App. p. 92a). It held the District Court's decision was inconsistent with its mandate and allowed "the Tribe to bootstrap section 194 in asserting its claim against the state." *Omaha III* (Pet. App. p. 99a). The Court of Appeals instructed the District Court to determine whether the Tribe had met its burden of proof as to the State and fee patent lands. (Pet. App. pp. 101a-103a). As to those lands, *Omaha III* required the Tribe to bear the burden of proving that the critical westward river movements from 1879 to 1923 were avulsive. (Pet. App. pp. 100a-102a). The Court of Appeals recognized the difficulty the party having the burden of proof might face and also recognized that it was likely "the Tribe will prevail only as to the trust lands formerly in possession of the private defendants, but not as to the remainder." (Pet. App. p. 103a).

The District Court on January 13, 1984, held that the Tribe failed to carry its burden of proving that the river's westward movements were avulsive. (Pet. App. pp. 11a-12a). The District Court quieted title in the State to the land it claimed and in the private landowners to fee patent lands. (Pet. App. pp. 12a-14a).

Starting in November 1985, the Tribe filed repetitive motions alleging that Justice Department attorneys defrauded the Tribe out of its land in Blackbird Bend by limiting its complaint to the trust land within the Barrett Survey. (Pet. App. pp. 321a, 276a). (The Tribe filed its own more expanded complaint and has been represented by its own counsel throughout this litigation.) The Court of Appeals dismissed the Tribe's petition for a writ of mandamus based on the alleged fraud, concluding that the petition was frivolous and without merit and awarding sanctions. *In Re: Omaha Indian Tribe* (Pet. App. p. 461a).

On May 29, 1987, the District Court entered its Final Judgment and Decree quieting title in the respective parties. (Pet. App. p. 16a). The decree was amended by order filed June 30, 1987, in which the District Court denied the government use of the escrow funds to satisfy its obligation to pay the private landowners for improvements. (Pet. App. pp. 34a-36a). The Court of Appeals affirmed the District Court's decision quieting title in the State and private landowners and reversed the District Court's decision as to the escrow funds. *Omaha IV* (Pet. App. pp. 42a-47a).

The Tribe's petition for rehearing en banc was denied on November 10, 1988 (Pet. App. p. 49a).

SUMMARY OF ARGUMENT

Petitioner has made no attempt to establish a reason for granting the writ. Instead the petition re-argues case-specific procedural and factual issues which have been

decided adversely to Petitioner by both the District Court and the Court of Appeals. There is no conflict in the lower courts or significant issue of law raised by the petition.

The petition is an untimely attack on procedural rulings made in 1976 – prior to the trial of this case and prior to a decision by this Court and four rulings by the Court of Appeals. Petitioner did not raise the "fraud" issue or attack the severance order in its initial appeal to the Court of Appeals in 1977. These issues were raised on the last remand only after Judge Bogue in January 1984 finally determined the ownership of the State and fee-patent lands. Petitioner has waived these issues, and no benefit would flow from Supreme Court review.

The Tribe's claims are dependent upon proof that the Missouri River jumped west by avulsion, leaving reservation land in place. The District Court found that the Tribe did not prove these avulsions. That finding was affirmed by the Court of Appeals, and the Tribe cannot show that this was clearly erroneous. The Tribe seeks to avoid the failure of its proof by bootstrapping its victory against private defendants in *Omaha II*. This Court has already determined that 25 U.S.C. § 194 shifts the burden of proof to private defendants, but not to the State. *Wilson v. Omaha Indian Tribe* (Pet. App. p. 132a). The Tribe's victory against the private defendants in *Omaha II* was based on a different burden of proof and cannot be given binding effect against the State. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972). The Court of Appeals correctly held that the Tribe's position is contrary to the mandate in *Omaha II* and is an improper attempt to bootstrap findings based on section 194 so as to apply

that statute against the State. *Omaha III* (Pet. App. p. 102a); *Omaha IV* (Pet. App. pp. 40a-42a).

The petition contains many errors. The Court should not rely on the description of the proceedings contained therein.

The decisions below were clearly correct.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO REASON FOR THIS COURT TO HEAR THE "FRAUD" ISSUE AS THAT ISSUE WAS NOT PROPERLY PRESERVED, HAS BEEN REJECTED BY THE COURTS BELOW AS FRIVOLOUS, AND WOULD NOT PROVIDE A GROUND FOR RELIEF FROM THE JUDGMENT, EVEN IF TRUE.

The Tribe claims that the United States Department of Justice fraudulently denied it title to 700 acres by excepting the land from its complaint. (Pet. p. 18). This claim was properly rejected by the District Court and Court of Appeals as wholly frivolous and without merit. (Pet. App. pp. 40a, n.4, 363a-366a, 461a).

The United States claimed only the "trust lands" within Blackbird Bend. This included the area which was once within the Omaha reservation (the Barrett Survey) except land which had been conveyed in fee to individuals prior to the river movements in question. (Pet. App. pp. 95a, 188a, n.70, 209a). This Court recognized the same distinctions in *Wilson v. Omaha Indian Tribe,* in holding that 25 U.S.C. § 194 applied to the area which had been in the reservation (the Barrett Survey) (Pet. App. p. 123a),

and in recognizing that state law would apply to claims where the United States has patented lands to private owners (Pet. App. p. 125a).

The more narrow scope of the United States' complaint has not precluded the Tribe from filing its own lawsuit, which claims 6390 acres in Blackbird Bend. (Pet. App. p. 269a). The Tribe independently presented its own case at trial. Its claim to lands outside the Barrett Survey is still pending. *Omaha IV* (Pet. App. p. 48a, n.6).

The determinative factor as to ownership in this litigation has been the applicability of section 194, not whether the United States claimed the land. Because of 25 U.S.C. § 194 and this Court's ruling in *Wilson v. Omaha Indian Tribe* (Pet. App. pp. 123a, 132a), private defendants were forced to bear the burden of proof concerning trust lands within the reservation (the Barrett Survey). Section 194 does not, however, apply to lands claimed by the State, which is not a "white person." *Wilson v. Omaha Indian Tribe* (Pet. App. pp. 121a-122a, 132a). Section 194 applies only if the Tribe makes out a presumption of title by establishing previous possession or ownership. It does not apply where the United States granted fee patents to individuals. The Tribe was therefore compelled to bear the burden of proof as to the State and the fee-patent lands. *Omaha III* (Pet. App. pp. 100a-103a). The Tribe was not able to meet this burden of proof. *Blackbird Bend III* (Pet. App. pp. 11a-12a). The Tribe therefore lost as to the fee-patent lands and the State lands within the Barrett Survey. Both the District Court and the Court of Appeals recognized that the placement of the burden of proof, and

not whether the United States claimed the land, determined the outcome of this case. (Pet. App. pp. 15a, 40a-44a, 96a-103a).

The District Court quite properly held that the Tribe's attempts to raise the "fraud" issue in 1986 and 1987 were untimely. Order of April 1, 1987 (Pet. App. p. 431a). The Tribe filed a request for a protective order based upon alleged improper representation by the Justice Department on September 3, 1976. (Pet. App. p. 407a). The Court granted the Tribe's request that it have independent procedural rights (Pet. App. pp. 416a-418a) but denied its motion to separate the United States' claim for trial. Order of October 26, 1976 (Pet. App. p. 417a). The Tribe did not raise this issue in its initial appeal to the Eighth Circuit or in subsequent appeals. Order of April 1, 1987 (Pet. App. p. 431a). This issue was resurrected eight years after trial and only after Judge Bogue's decision on the last remand. That the fraud issue provides no ground for relief against these defendants is further shown by the fact that the Tribe raised this issue by a motion to have Justice Department attorneys disqualified (Pet. App. pp. 321a-328a), and then by a motion for summary judgment against named Justice Department attorneys. (Pet. App. pp. 276a, 285a). The Tribe then filed repeated motions under the rubric of motions to strike surveys, motion to have the Court disqualify itself, etc.[2]

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[2] See docket entries 624, 635, 639, 645, 658, 669, 675, 681, and 683. Note that the judge hearing these motions and personally accused of "consummating the fraud" was the Honorable Edward J. McManus. The Honorable Andrew Bogue heard the case and ruled on the merits, not Judge McManus.

Both the District Court and the Court of Appeals concluded that the Tribe's fraud charges were wholly frivolous and without merit. Order, February 21, 1986 (Pet. App. pp. 364a-366a); *In Re: Omaha Indian Tribe* (Pet. App. p. 461a).

The Tribe's fraud claim is not credible. It claims that it was fraud for United States Attorney Evan Hultman to file the complaint on behalf of the United States because Hultman was Attorney General for Iowa in 1965 when the State settled a quiet-title suit between itself and private defendants in this same area. (Pet. p. 7). The Tribe has not shown how this previous settlement affected the Tribe's claim in this case. Further, the Tribe itself claims that the United States' complaint was prepared by Deputy Attorney General Myles Flint, not Hultman. (Pet. p. 11). The Tribe erroneously states that the 700 acres excepted from the United States' complaint were identical to the lands obtained by the State in settlement of the 1965 state court lawsuit. (Pet. p. 14). Instead the United States' complaint excepted lands which had been conveyed out of trust by fee patents. (Pet. App. pp. 188a, n.70, 209a).

As the Ninth Circuit Court of Appeals stated in addressing similar claims by Mr. Veeder that the United States Department of Justice was "fraudulently representing" a Tribe, the Tribe's remedy where it is dissatisfied with Justice Department representation is to intervene and forcefully present its own position. *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 924 (9th Cir. 1986). Here the Tribe presented its own case, and there is no basis for reversing the judgment simply because the United States filed a more narrow complaint than did the Tribe.

II. THERE IS NO REASON FOR THIS COURT TO REVIEW THE 1976 PRE-TRIAL ORDER WHICH PROVIDED THAT TITLE TO LAND WITHIN THE BARRETT SURVEY WOULD BE TRIED SEPARATELY FROM TITLE TO LAND OUTSIDE THE ORIGINAL RESERVATION.

In April 1976 the District Court determined that claims to the area once within the reservation would be tried separately from ownership of the area outside the Barrett Survey. (Pet. App. p. 405a). The Tribe now claims that this Court should award it title not only to all 2900 acres within the Barrett Survey but also to an additional 3490 acres. Ownership of the land outside the Barrett Survey has not been tried.

The District Court's Findings of Fact explained the reasons for trying these portions separately:

> . . . the Barrett Survey line is the only clearly ascertainable line of demarkation, and was the boundary of the area of which the Tribe received possession by virtue of a preliminary injunction entered June 5, 1975. Thus as to the Barrett Survey Area the action was construed as an equitable quiet title action, and the demands of various defendants for a jury trial were denied as to that area. As to lands claimed by the Tribe outside the Barrett Survey Area, the action was treated as a legal action for ejectment, in which defendant's demands for a jury trial may be sustainable . . . .

(Pet. App. p. 208a). (*See also* Pet. App. p. 405a).

The Tribe did not challenge the April 5, 1976, severance order on appeal. (Pet. App. p. 44a, n.5). It therefore waived any objections to the ruling establishing the order in which these proceedings would be tried.

To permit the Tribe to expand the scope of the trial after the fact would deny due process. Other parties who claim land outside the Barrett Survey did not participate in the trial of claims within the Barrett Survey. Order, Nov. 8, 1984 (Add. p. A-20). Further, the defendants within the Barrett Survey are entitled to a jury trial outside the survey area. Order, August 8, 1988 (Add. pp. A-25-A-26).

The Tribe's argument also ignores the different burdens of proof which apply to each area. The Tribe has the burden of proof on lands outside the Barrett Survey and cannot rely on 25 U.S.C. § 194 to shift that burden to the defendants. *Omaha I* (Pet. App. p. 187a, n.69). The Tribe prevailed on its claims to trust lands against private defendants solely because those defendants were forced to bear the burden of persuasion under 25 U.S.C. § 194. *Omaha III* (Pet. App. pp. 95a-96a, 101a). Findings in favor of the Tribe applying 25 U.S.C. § 194 cannot be given binding effect in portions of the proceedings where the Tribe has the burden of proof. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 234-236 (1972); *Omaha III* and *Omaha IV* (Pet. App. pp. 48a, n.6, 99a). Further, the preclusive effect, if any, to be given the judgment in the first portion of the litigation is to be determined by the court in the second portion of the litigation – after discovery of the basis of the Tribe's claim to land outside the Barrett Survey.

III. THE COURT OF APPEALS CORRECTLY HELD IN *OMAHA III*, 707 F.2d 304 (8th CIR. 1982), THAT FINDINGS BASED ON 25 U.S.C. § 194 WERE NOT BINDING AGAINST THE STATE, TO WHOM SECTION 194 DOES NOT APPLY.

The Tribe's lawsuit depends on the conclusion that the Missouri River always moved east in Blackbird Bend by accretion, thus adding land to the reservation, and always jumped back west by avulsion. (Pet. App. pp. 210a-211a). The only basis on which the Tribe can claim any of this land is by establishing that the river moved away from the Iowa high bank by avulsion.

The trial judge concluded that the river always moved by accretion. *Blackbird Bend I* (Pet. App. pp. 242a-244a). After this Court's decision in *Wilson* (Pet. App. p. 107a), the Court of Appeals reversed as to the private defendants. It held that the private defendants could not overcome the presumptive Indian title created by section 194 even though the Tribe's "[e]vidence supporting the possibility of avulsive chute channels or a neck cut-off does not equally balance defendants' proof . . . " *Omaha II* (Add. p. A-17). Where section 194 applied, the Court of Appeals held that the Tribe prevailed even without proof that the alleged avulsions left any identifiable land in place. *Omaha II* (Add. p. A-13).

The Tribe claims that its victory in *Omaha II* requires that it also prevail as to the State lands and the fee-patent lands. The trier of fact, however, found that the Tribe did not prove that the river moved by avulsion, and the Court of Appeals affirmed this finding. *Blackbird Bend III*;

Omaha IV (Pet. App. pp. 11a-12a, 42a-44a). The Court of Appeals properly rejected the Tribe's attempt to bootstrap section 194 onto the State's claims in *Omaha III* and *Omaha IV* (Pet. App. pp. 40a, n.4, 99a).

This Court held in *Wilson v. Omaha Indian Tribe* that section 194 does not operate against the State of Iowa. (Pet. App. pp. 121a, 132a). The findings in *Omaha II* could not be given preclusive effect against the State because *Omaha II* was based upon a different burden of proof. A finding against other parties based on a different burden of proof cannot be given binding effect against the State. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *Omaha III* (Pet. App. pp. 99a-100a); *Omaha IV* (Pet. App. p. 48a).

Further, the Court of Appeals has twice explained that its decision in *Omaha II* did not establish that the Tribe proved its case, as the Tribe claims. *Omaha III* (Pet. App. pp. 101a-102a); *Omaha IV* (Pet. App. p. 43a). Instead the decision against private defendants was based entirely on the presumption of title created by section 194. (Pet. App. pp. 101a-102a).

The petition for certiorari is misleading when it states that the District Court's second decision in this case held that the Tribe met its burden of proof even without the benefit of section 194. (Pet. p. 3, n.6). What the District Court held in *Blackbird Bend II* was that the Tribe need not prove the avulsions to recover against the State because of the holding in *Omaha II*. (Pet. App. pp. 56a, 83a-84a). The District Court expressly remained convinced, however, that the river had never moved by avulsion, an essential predicate to the Tribe's theory.

Blackbird Bend II (Pet. App. pp. 83a-84a). The Court of Appeals reversed, holding that the District Court misconstrued the mandate in *Omaha II*. *Omaha III* (Pet. App. pp. 99a-100a). The Court of Appeals held that the Tribe could not "bootstrap" its victory under section 194 to avoid establishing all elements of its case against the State, or upon fee-patent lands. *Omaha III* (Pet. App. pp. 99a-103a). On remand, the District Court squarely held that the Tribe failed to meet its burden of persuasion, and the Court of Appeals affirmed. *Blackbird Bend III; Omaha IV* (Pet. App. pp. 11a-12a, 41a-44a).

IV. THE DISTRICT COURT'S DECISION, WHICH WAS AFFIRMED BY THE COURT OF APPEALS, WAS NOT CLEARLY ERRONEOUS.

Petitioner's claim that the District Court's findings, affirmed by the Court of Appeals, were clearly erroneous provides no reason to grant its petition.

The trial court heard six weeks of trial. The District Court reviewed the evidence on three occasions and each time determined that the Tribe had not established its theory that the Missouri River moved by avulsion during the critical time periods. *Blackbird Bend III* (Pet. App. pp. 11a-12a); *Blackbird Bend II* (Pet. App. pp. 83a-84a); *Blackbird Bend I* (Pet. App. pp. 242a-244a). The Court of Appeals, which has reviewed this case on four occasions, upheld the District Court's determination that the Tribe failed to carry its burden of proof as to the State and fee patent lands. *Omaha IV* (Pet App. pp. 42a-44a).

In reviewing trial court decisions claimed to be "clearly erroneous" under Fed. R.Civ. P. 52(a), this Court

has consistently emphasized the degree of deference to be given trial court's findings. *Andersen v. Bessemer City*, 470 U.S. 564, 573-574 (1985). *See also Amadeo v. Zant*, 486 U.S. ___, 108 S.Ct. 1771 (1988). The Court of Appeals applied the correct legal standard and upheld the trial court findings. The decision below is clearly correct.

This Court is a court of law "rather than a court for correction of errors in fact finding." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Review of fact findings is primarily the function of the courts of appeals. The Court of Appeals for the Eighth Circuit has appropriately carried out that function. This Court has previously stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.). It is apparent that the petition seeks to embroil this Court in case-specific review of facts. Granting the writ would be an unwarranted use of the limited resources of this Court.

CONCLUSION

For the reasons set forth above, Respondents State of Iowa and the Iowa Department of Natural Resources respectfully request that this Court deny the Tribe's Petition for a Writ of Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 77-1384, 77-1387

No. 77-1384

Omaha Indian Tribe, Treaty of 1854 with the United States (10 Stat.1043), Organized pursuant to the Act of 6/18/34 (48 Stat.984; 25 USC 476) as amended, Appellant, v. Roy Tibbals Wilson, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company, The State of Iowa, Darrell L., Harold, Harold M. and Luea Sorenson, State Conservation Commission of the State of Iowa, Appellees.	Appeal from the United States District Court for the Northern District of Iowa.

No. 77-1387

United States of America, Appellant, v. Roy Tibbals Wilson, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company, and the State of Iowa, Appellees.	*	Appeal from the United States District Court for the Northern District of Iowa.

Submitted: June 13, 1977

Filed: January 15, 1980

Before LAY, Chief Judge,* STEPHENSON and HENLEY, Circuit Judges.

LAY, Chief Judge.

These cases have been remanded to us by the United States Supreme Court for reconsideration in light of the principles set forth in its June 20, 1979 opinion. *Wilson v. Omaha Indian Tribe*, 99 S.Ct. 2529 (1979).

*Judge Lay became Chief Judge of the Eighth Circuit on January 1, 1980.

I. *Factual Background.*

At issue is ownership of approximately 2,900 acres of land lying adjacent to the Missouri River in an area called Blackbird Bend located in what was then the Territory of Nebraska, and which is conceded to have been set aside in 1854 by treaty as a reservation for the Omaha Indian Tribe. The tortured history of the land dispute and attendant controversy over the nature of the early movements of the Missouri River is fully set forth in the district court's opinion, 433 F. Supp. 67 (N.D. Iowa 1977), as well as in this court's previous decision, 575 F.2d 620 (8th Cir. 1978). This court reversed the district court's judgment in favor of the defendants and against the Tribe. We did so for two reasons: (1) We held the district court failed to apply federal law rather than state law in regard to burden of proof, 25 U.S.C. § 194, and substantive law concerning accretion and avulsion; and (2) we found the proof of accretion adduced by defendants was conjectural and speculative and defendants failed to meet the requisite burden.

The Supreme Court granted certiorari, confining its review to the applicability of 25 U.S.C. § 194, and whether federal or state law should have been employed to determine the substantive issue of river movement.

Generally, the Court sustained our holding that 25 U.S.C. § 194 was applicable and placed both the burden of going forward with the evidence and of persuasion upon the defendants.[1] The statute reads:

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[1] The Court held 25 U.S.C. § 194 did not apply to land claimed by the State of Iowa, because a sovereign could not be construed to be a "white person" within the meaning of the Statute. *Wilson v. Omaha Indian Tribe,* 99 S.Ct. 2529, 2537-38 (1977).

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

The Court also agreed that the Tribe's right to the property depended upon federal law, " 'wholly apart from the application of state law principles which normally and separately protect a valid right of possession,' " 99 S.Ct. at 2539 (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677 (1974)). Nonetheless, the Court held the legal standard to be employed in determining whether accretion or avulsion occurred, absent any boundary dispute or other need for a uniform federal rule, should be borrowed from applicable state property law, in this case the law of the State of Nebraska. 99 S.Ct. at 2543.

II. *Nebraska Law.*

On review of the governing principles of state law, we hold the district court's interpretation of Nebraska law was incorrect, and adhere to our prior opinion that all parties making claim against the Tribe, with the exception of the State of Iowa, demonstrated only speculative and conjectural evidence of their right to have title to the reservation land, which was granted to the Tribe by the Treaty of 1854, quieted in them. We hold that those parties failed to sustain the burden of proof placed upon

them by 25 U.S.C. § 194 and title to the land in question should be quieted in the Tribe.[2]

Our disagreement with the district court was with its broad definition of accretion and correspondingly narrow definition of avulsion. We stated:

> The trial court . . . held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. We find this ruling inconsistent with settled principles governing the rule of accretion and the broader parameters involving the doctrine of avulsion.

575 F.2d at 639.

We also held the district court erroneously placed the burden of proof on the Tribe, although it did not give defendants the benefit of a presumption of accretion. *Id.* at 633. The result was that defendants received the benefit of any favorable inferences from sketchy proof of avulsion: what was not clearly proved avulsive must, in the district court's view, be the result of accretion.

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[2] The Supreme Court stated we found the evidence was in "equipoise." 99 S.Ct. at 2535. We recognize the Court could have reasonably concluded we found the evidence evenly balanced from our statement that "defendants have failed in sustaining their burden of proof under § 194." Nevertheless, we did not intend to convey that assessment of the weight of the evidence. Nor do we here; rather, we adhere to our prior holding that defendants failed to meet their burden because their "case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved." *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 650 (8th Cir. 1978).

The Supreme Court's decision makes it clear that defendants shoulder the burden of persuasion on the question of whether the Tribe is no longer entitled to possession of the area which was in the past part of its reservation. To quiet title in themselves, defendants must show the strength of their title; they must prove by a preponderance of the evidence that the River changed by the process called accretion. Thus they do not have the advantage, as they did under the trial court's reasoning, of inferences drawn from any weaknesses in evidence tending to show avulsion. *See Mitchell v. Beermann*, 175 Neb. 616, 620, 122 N.W.2d 525, 527 (1963); *Jones v. Schmidt*, 170 Neb. 351, 355, 102 N.W.2d 640, 644 (1960); *De Long v. Olsen*, 63 Neb. 327, 329, 88 N.W. 512, 513 (1901).

Upon examination of Nebraska case law, we conclude Nebraska adheres to the common law principles governing avulsion and accretion set forth in our earlier opinion.[3] Federal and Nebraska law do not differ substantially in the basic definition of the terms, perhaps

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[3] We note the district court, as well as the original briefs of each of the defendants, the Government and the Tribe expressed the opinion that Nebraska law governing accretion and avulsion was not substantially different from federal law. While we still disagree with the district court's failure to use federal law in allocating the burden of proof, it is now decided that governing substantive rules are not drawn from the federal common law. With the case in this changed posture, we agree with the district court's statement that, as to definitions of accretive and avulsive movement of the Missouri River, there is no significant difference between federal and Nebraska law relevant to this case. *United States v. Wilson*, 433 F. Supp. 57, 65 (N.D. Iowa 1977).

because of the shared origin of the common law principles in Roman and early English law. Our prior analysis, commencing with early definitions from the Institutes of Justinian through the early United States Supreme Court cases including *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395 (1870); *Jefferies v. East Omaha Land Co.*, 134 U.S. 178 (1890); *Nebraska v. Iowa*, 143 U.S. 359 (1892), and this court's decisions in *Davis v. Anderson-Tully Co.*, 252 F. 681 (8th Cir. 1918); *Commissioners of Land Office v. United States*, 270 F. 110 (8th Cir. 1920), *appeal dismissed*, 260 U.S. 753 (1922), finds full accord in Nebraska case-law. Nearly all the earlier Nebraska cases we have examined rely upon these and other early federal cases for definitions of accretion and avulsion.

The early United States Supreme Court cases of *Mayor, Alderman & Inhabitants of New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836) and *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46 (1874), were cited as rules of decision and quoted in the early Nebraska case of *Gill v. Lydick*, 40 Neb. 508, 59 N.W. 104 (1894), and also in *Frank v. Smith*, 138 Neb. 382, 293 N.W. 329 (1940). As the Nebraska Supreme Court stated in *Lienmann v. Sarpy County*, 145 Neb. 382, 392, 16 N.W.2d 725, 729 (1944), citing several representative cases, it "has repeatedly followed the rules of law as stated in State of Nebraska v. Iowa, supra." *See also Mercurio v. Duncan*, 131 Neb. 767, 769, 269 N.W. 901, 902 (1936); *Independent Stock Farm v. Stevens*, 128 Neb. 619, 621, 259 N.W. 647, 648 (1935); *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 610, 148 N.W. 328, 329 (1914); *De Long v. Olsen*, 63 Neb. at 331, 88 N.W. at 514. Principles articulated by this court in *Commissioners of Land Office v. United States*, 270 F. 110 (8th Cir. 1920),

appeal dismissed, 260 U.S. 753 (1922), were quoted with approval in *State v. Ecklund*, 147 Neb. 508, 521-22, 23 N.W.2d 782, 789-90 (1946) and were applied in *Durfee v. Keiffer*, 168 Neb. 272, 280, 95 N.W.2d 618, 624 (1959), and *Frank v. Smith*, 138 Neb. at 392, 293 N.W. at 334-35. An even earlier eighth circuit case, *Whiteside v. Norton*, 205 F. 5 (8th Cir. 1913), *appeal dismissed*, 239 U.S. 144 (1915), was also followed in *Durfee v. Keiffer*. As the district court stated: "Nebraska law has relied heavily on federal law in formulating its definitions of accretion and avulsion." *United States v. Wilson*, 433 F. Supp. at 65.

The case of *Nebraska v. Iowa*, 143 U.S. 359 (1892), which has had a seminal influence on the development of the legal definitions of accretion and avulsion in Nebraska case law, established that while the nature of the Missouri River might lead one to assume otherwise, the law of boundary changes due to diminution and accretion could apply to the River, at least "in the mere washing of the waters of the stream." *Id.* at 370. While erosion might take place rapidly on the banks of the Missouri, the boundary change rule would still apply as long as the land eroded so as to be completely disintegrated, *and* the accretion, despite the unusual rapidity of the erosion, was "a mere gradual and imperceptible process." *Id.* at 369; *see also, De Long v. Olsen*, 63 Neb. at 331, 88 N.W. at 514.

As Nebraska case law makes clear, this basic statement of accretive change in the Missouri River has two elements. First, a boundary changes only where the River's change of channel is caused by a process of erosion or excavation of earth from one bank and deposition of unidentifiable silt and sediment on the other – the

land between the old and new channels must be completely disintegrated. This point is made most dramatically in *State v. Ecklund*, a case in which title to old river bed land, bared by a river's gradual change in channel, was retained in accordance with the original boundary line, as is the case in avulsion. The river movement was not accretive, as the term is legally defined, because the river did not shift its channel by excavating or eroding intervening land, but by flowing around it. 147 Neb. at 523, 23 N.W.2d at 789. Other cases, involving title to islands rather than old river bed land, also illustrate the principle. *E.g., Valder v. Wallis*, 196 Neb. 222, 242 N.W.2d 112 (1976); *Durfee v. Keiffer.*

The second element, stressed by the court in *Nebraska v. Iowa*, is that no matter how "rapid and great" is "the abrasion and washing away," or "the diminution," of soil, the accretion (or reliction) of soil "is always gradual and by the imperceptible deposit of floating particles of earth." 143 U.S. at 368-69.[4] This point, the gradual and imperceptible nature of accretive change as stressed in *Nebraska v. Iowa*, is evident in Nebraska cases.[5] *See, e.g.,*

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[4] Gradual and imperceptible does not mean change cannot be perceived, but only that the entire process, that is the accretion as well as the often rapid erosion, is not clearly perceptible as it is going on. *Gill v. Lydick*, 40 Neb. 508, 510-11, 59 N.W. 104, 105 (1894).

[5] Both elements are necessary. Gradual change without erosion of intervening land is not within the rule of accretive change, *see State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946); nor is the washing away of soil sufficient, if the land is not

(Continued on following page)

Bouvier v. Stricklett, 40 Neb. 792, 798-99, 59 N.W. 550, 553 (1894); *Gill v. Lydick*, 40 Neb. at 512, 59 N.W. at 105; *Mercurio v. Duncan*, 131 Neb. at 768-69, 269 N.W. at 903; *Jones v. Schmidt*, 170 Neb. at 356, 102 N.W.2d at 644.

Clear distinctions become obscured when applied to the actual movement of uncontrolled rivers, as we noted in our prior opinion. Nevertheless, the elements of river channel change through the process of excavation or erosion and deposition or accretion must have been established for defendants to have met their burden of proof under Nebraska law. Not only is accretive change defined more precisely in Nebraska law than in the district court's opinion, but correspondingly, the Nebraska Supreme Court's definition of avulsion is similar to that set forth in our prior opinion as the federal standard, in that it is not as narrow as the district court's reasoning

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(Continued from previous page)

gradually added, but suddenly formed. *See Wiggenhorn v. Kountz*, 23 Neb. 690, 37 N.W. 603 (1888). Statements echoing those of the Court in *Nebraska v. Iowa*, 143 U.S. 359 (1892) concerning the rapidity of change in the Missouri, *See, e.g., De Long v. Olsen*, 63 Neb. 327, 331, 88 N.W. 512, 514 (1901); *Kinkead v. Turgeon*, 74 Neb. 580, 586-89, 109 N.W. 744, 746-47 (1906), (vacating 74 Neb. 573, 104 N.W. 1061 (1905)); *see also* discussion in *United States v. Wilson*, 433 F. Supp. 57, 62-64 (N.D. Iowa 1977), refer to the rapid and sudden erosion and do not lessen the importance of the gradual and imperceptible requirement as it pertains to the second element of the movement process, accretion (or reliction) of soil. *See Nebraska v. Iowa*, 143 U.S. at 369.

would indicate.[6] In contrast to the process of erosion and gradual deposition, avulsive movements of a river channel are characterized primarily by their suddenness and perceptibility.

The Nebraska cases indicate Nebraska follows the basic common law principle: avulsion occurs when there is a sudden and rapid change of the channel, within or without the bed of a stream, whether or not intervening land is submerged during a sudden flood. A recent definition given by the Nebraska Supreme Court indicates the broad parameters of avulsive movement include movement within the river bed, and also illustrates the primary emphasis on sudden change:

> " 'Avulsion' is a sudden and perceptible loss or addition to land by the action of water, *or* a sudden change in the bed or course of a stream." 78 Am.Jur.2d, Waters, s. 406, p. 852. See, also, *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190; *Mercurio v. Duncan*, 131 Neb. 767, 269 N.W. 901.

Valder v. Wallis, 196 Neb. 222, 224, 242 N.W.2d 112, 114 (1976) (emphasis added).

Other cases stress the sudden character of avulsive change as its primary distinction from the process of erosion and gradual deposition. *See, e.g., Gill v. Lydick*, 40

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[6] It should be noted that there is no presumption in Nebraska law that change in a river channel in general or in the Missouri is due to accretion. *See Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960). In fact, even though the Supreme Court decided in *Nebraska v. Iowa*, 143 U.S. 359 (1892), that accretion could occur on the Missouri, the Nebraska Supreme Court noted that "[t]he Missouri river often changes its course by avulsion, ..." *Independent Stock Farm v. Stevens*, 128 Neb. 619, 621, 259 N.W. 647, 648 (1935).

Neb. at 512, 59 N.W. at 105 ("[B]ut, if the alteration takes place suddenly, the land thus formed does not belong to the proprietor of the adjoining soil."); *Wiggenhorn v. Kountz*, 23 Neb. at 694, 37 N.W. at 605 (quoting 3 Washburn R. P. 60 (4th ed.)) (" 'The difference between avulsion, . . . and alluvion, consists in the one being done by imperceptible loss from the land of one, and increment to that of the other; and in the other, its being done suddenly, to an extent which can be ascertained and measured.' "); *Ingraham v. Hunt*, 159 Neb. 725, 732, 68 N.W.2d 344, 348-49 (1955) ("a flood suddenly, violently, and visibly, by avulsion, changed its channel. . . .during the next few years, there were several flash floods which again suddenly, violently, and visibly by avulsion moved the channel. . . . ."); *Jones v. Schmidt*, 170 Neb. at 356, 102 N.W.2d at 644 (Some of the new structures [of land] came into being with suddenness, and others imperceptibly by addition over long periods of time to other structures. . . .the latter . . . is termed accretion.")[7]

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[7] While the district court correctly noted the Nebraska Supreme Court reversed an earlier finding of avulsion and held movement which occurred during a single high water period caused by an ice jam was accretive in *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943) (vacating 141 Neb. 517, 4 N.W.2d 290 (1942)), the decision does not, we feel, represent a departure from the basic common law definitions. It may be better explained by the fact that no party pleaded avulsion, as none had title to the land in question if the old channel remained as the boundary. They sought title through adverse possession of accretive land. *Id.* at 8, 9, 8 N.W.2d at 541. *Conkey II* does mention absence of identifiable land, but nevertheless gives the basic common law definition of avulsion: "Avulsion is the sudden and rapid change in the course and channel of a river." *Id.* at 10, 8 N.W.2d at 541.

Thus, in a channel shift the primary distinction in Nebraska law is between sudden and perceptible change and the process of erosion and gradual, imperceptible deposition. We adhere, therefore, to our earlier holding that the district court erred in including within the definition of accretive change a sudden movement without evidence of identifiable land in place.[8] Defendants' burden is not met by the absence of proof of identifiable land in place; of greater importance is the sufficiency of proof

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[8] Although we illustrated with specific federal cases, *Veatch v. White*, 23 F.2d 69 (9th Cir. 1927); *Uhlhorn v. United States Gypsum Co.*, 366 F.2d 211 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967), we noted in other jurisdictions adopting common law principles, identifiable land in place is a "significant" factor, but not the *sine qua non* to finding an avulsive shift of channel. We specifically cited Nebraska cases that referred to identifiable land in place when using Vattel's reference to avulsion in illustrating the "insensible" character of accretion, quoted in *Nebraska v. Iowa*, 143 U.S. 359, 366 (1892): "[W]hen the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner." We then noted the context was not a narrow definition of avulsion, but rather the Supreme Court's attempt to show accretion, as well as avulsion, could take place on the Missouri. *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 635 n.30 (8th Cir. 1978). Our analysis of federal case law and that of other jurisdictions, set forth in section V, concludes that other jurisdictions concur in the general definition of avulsion as sudden movement and the possibility of its occurrence within as well as without the bed of a stream. *Id.* at 637 n. 32, 33. We concluded: "Several state cases have similarly recognized that the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion. *Id.* at 637 (footnote omitted).

of erosion and gradual accretion. Because the unusually sudden and rapid erosion on the Missouri blurs the theoretical distinction between avulsion and accretion, the presence of identifiable land in place may have significant probative value in that it disproves one element of accretive change: erosion. *Omaha Indian Tribe v. Wilson*, 575 F.2d at 637. The absence of identifiable land above high water cannot make defendants' case, however. Erosion must be shown; the mere fact that intervening land was once submerged does not yield the inference of river movement by accretion. For instance, in *State v. Ecklund*, the intervening land in a channel change was old river bed land. This fact alone did not justify application of the rule of accretion, however. The boundary remained the same, because the cause of the channel change was not gradual movement across the land by excavation and accretion, but diversion of the river's flow around a body of land. *Ecklund* relied upon an early opinion of this court concerning the situation where change, albeit gradual, is not due to erosion and subsequent accretion:

> To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion if its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the

> boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.

147 Neb. at 522, 23 N.W.2d at 789-90 (quoting *Commissioners of Land Office v. United States*, 270 F. at 113).[9]

Because both inundation and baring of land are part of the swift change process referred to as avulsion, *see* Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N.D. L. Rev. 429, 431 (1967), intact land may well be temporarily under high water. As was noted by the district court, 433 F. Supp. at 65, when a bank is composed of point bar deposits, or sand and sediment, it may be difficult to detect land present prior to the swift inundation and baring of avulsive movement. Similarly, deposits of alluvion which increase a bank by accretion may follow avulsive changes. *See, e.g., Independent Stock Farm v. Stevens*, 128 Neb. at 622, 259 N.W. at 649. Therefore, evidence of relative variations in water elevation at different times and some changes in topographical conditions alone is not sufficient to prove accretion. *See, e.g., Jones v. Schmidt*, 170 Neb. 351, 358, 102 N.W.2d 640, 645 (1960).

We conclude both Nebraska and federal common law apply the same basic definitions of avulsion and accretion to boundary disputes caused by a river channel change. We hold the district court incorrectly interpreted the

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[9] *Commissioners of Land Office v. United States*, 270 F. 110 (1920), *appeal dismissed*, 260 U.S. 753 (1922), relied upon *Davis v. Anderson-Tully Co.*, 252 F. 681 (8th Cir. 1918), which was quoted in our prior opinion. *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 637 n.34 (8th Cir. 1978).

Nebraska cases to hold that all river movements, other than those in which intervening land above the high water mark is identifiably in place, are included within the term accretion. Thus, our review of the evidence in sections VI-VIII of our prior opinion compels the same holding: defendants' evidence supports only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods. Inferences drawn from the 1879 map, admittedly prepared at high water, are inconclusive; prior alluvion in that area means identifying features would be few; erosion on the surface of the point of land could have occurred as it was bared following swift inundation in the avulsive process. As we observed in our earlier opinion, the evidence strongly suggests avulsive change in 1879 through a series of chute channels or a cut-off across the neck of the Blackbird Bend. As to the later time periods, the little scientific evidence there is in the record contradicts the defendants' theory.

III. *Application of Law to Facts.*

Even assuming the district court properly interpreted Nebraska law, nonetheless our review of the record demonstrates the district court findings are clearly erroneous. Even if it be assumed that identifiable land in place is the *sine qua non* of avulsive movement, the evidence of identifiable land in place or the lack thereof is simply too inconclusive, too dependent on speculation and conjecture, to support the inference of accretive change. Not only is defendants' evidence of a lack of identifiable land in place inconclusive, *Omaha Indian Tribe v. Wilson*, 575

F.2d at 640-41, but there is evidence the land could be the same surface area described by Barrett. *Id.* at 641. Evidence supporting the possibility of avulsive chute channels or a neck cut-off does not equally balance defendants' proof, but rather points to the speculative and conjectural nature of *any* conclusions drawn from the evidence. Evidence of river movement in the critical periods too often gives no more than a basis for an "educated guess," in the words of defendants' expert witness, Raymond L. Huber. Particularly in light of the requirement that defendants, because of the presumption applicable under 25 U.S.C. § 194, succeed on the strength of their own case and not any weakness in their opponents' claim to title, we conclude they failed to meet their burden of proof. As we stated previously, "the ultimate conclusion may not rest on mere guesswork." *Omaha Indian Tribe v. Wilson,* 575 F.2d at 650.

IV. *State of Iowa.*

We turn now to the reversal of this court's judgment that the State of Iowa was similarly bound by 25 U.S.C. § 194's allocation of the burden of proof. The record is not clear as to the time period and as to the specific land involved, in the Tribe's claim that land allegedly owned by the State was cut away from the reservation by avulsion. Under the circumstances, we feel the Tribe's case against the State should be separately remanded, and an opportunity given to sever the claim against the State and point out specific evidence relied upon to show avulsion

on the particular land claimed by the State.[10] The district court shall review this evidence and make separate findings in regard to it.

The judgment of the district court is ordered vacated; the cause is remanded with directions to enter judgment quieting title to the trust lands involved in this action, except those claimed by the State of Iowa, in the United States as trustee and the Omaha Indian Tribe; the prior orders relating to escrow funds and accounting procedures, with the exception of those funds relating to the land now claimed by the State of Iowa, governing the 2,900 acres within the original boundary of the Barrett Survey as originally ceded to the Tribe in the Treaty of 1854, are ordered dissolved. The judgment of the district court is vacated as to the State of Iowa, and the cause remanded with directions that the Tribe's case against the State be severed and the Tribe given an opportunity to clarify its allegations against the State and the evidence it relies upon, so that the district court may separately review whether the Tribe has sustained its burden of proof against the State.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[10] We fail to understand the Tribe's argument that the State's case is defective because its title is based upon quitclaim deeds, but will allow the Tribe to restate the argument in district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN R. WILSON, et al., Defendants.	C 75-4024
OMAHA INDIAN TRIBE, etc., Plaintiff, vs. HAROLD JACKSON, et al., Defendants.	C 75-4026 *O R D E R* (Filed Nov. 8, 1984)
OMAHA INDIAN TRIBE, Plaintiff, vs. AGRICULTURAL INDUSTRIAL INVESTMENT CO., et al., Defendants.	C 75-4067

This matter is before the court on plaintiff's resisted motion for reconsideration and for stay, filed October 19, 1984 and the State of Iowa's application for possession, filed May 17, 1984. Motions denied.

On September 7, 1984, this court amended Judge Bogue's order of January 13, 1984 and certified certain questions of law for interlocutory appeal pursuant to 28 USC § 1292. On October 11, 1984, the Eighth Circuit

denied the petitions for permission to appeal in connection with this order. Thus, the matter is again before this court in the same posture that preceded the September 7 order.

In the motion now under consideration, the Tribe has once again invited the court to reconsider the issues decided by Judge Bogue in the January 13, 1984 order. The court has previously declined plaintiff's invitation and believes it should be refused again. While this judge may or may not have resolved the issues decided by Judge Bogue in the same manner, this court sees no reason to reconsider a decision made by the judge most familiar with the evidence and the prior appeals in this case.

Nor does the court believe that there is any merit, at this juncture, to the Tribe's suggestion that the court reconsider the 1976 severance order and the January 13, 1984 order so as to quiet title to lands outside the Barrett Survey in the Tribe. The practical effect of such an order would be the denial of due process to those defendants in the consolidated actions who now occupy land within the Blackbird Bend area but outside the boundaries of the Barrett Survey. These parties are yet to be heard and the Tribe's action against them is in a procedurally different posture since it is an action at law for ejectment rather than a quiet title proceeding.

In the opinion of this judge, the mandate from the Eighth Circuit is clear. It will be necessary to resolve all issues arising out of the Barrett Survey portion of the consolidated cases before an appeal may be taken. Therefore, it will now be necessary to obtain legal descriptions

for those parcels to which title will be quieted in the State of Iowa and the private defendants. Once these descriptions are prepared, the court shall proceed with the issues concerning improvements on the 2,200 acres to which title will be quieted in the Tribe and in the United States as trustee for the Tribe. It is the court's further opinion that the Tribe's claim for trespass damages on these lands, previously severed from this part of the action by the court's order of April 5, 1976, should be consolidated and taken up in connection with the improvement claims.

The court has again reviewed Judge Bogue's order of October 22, 1976 and is of the opinion that this order affirmatively establishes the Bureau of Land Management's March 2, 1976 Dependent Resurvey as the controlling retracement of the 1867 Barrett Meander Line. The court intends to abide by this order unless the Tribe, by not later than November 26, 1984, makes a showing by proper affidavits and briefs that it has either exhausted its administrative remedies in connection with the alleged errors or that exhaustion of such remedies is not required in the context of this case. Any resistance to such showing by defendants shall be filed within the time provided by the Local Rules. The court shall then determine if any further hearing is required on these matters.

With regard to the State's pending application for possession, it is the court's opinion that the application is premature and should be denied. The precise boundaries of the parcels which will be quieted in the State have yet to be determined and it is the court's opinion that the State's interests will be adequately protected by maintenance of the parties' current positions until final judgment can be entered. If the State is seriously contending

that the Tribe's repair to the access road is in violation of the court's prior orders and has caused damage to the parcels which it claims, the State may submit a counterclaim for such damage as part of this proceeding.

It is therefore

ORDERED

1. Motions denied.

2. The Tribe shall, by not later than November 26, 1984, file a brief and any supporting affidavits required to show that it has exhausted its administrative remedies in connection with the alleged errors in the Bureau of Land Management's March 2, 1976 Dependent Resurvey or that exhaustion of such remedies is not required in the context of this case. Any resistance to such showing by defendants shall be filed according to the provisions of Local Rule 2.2.6.

November 8, 1984.

/s/ Edward J. McManus
Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN R. WILSON, et al., Defendants.	C 75-4024
OMAHA INDIAN TRIBE, etc., Plaintiff, vs. HAROLD JACKSON, et al., Defendants.	C 75-4026 *O R D E R* (Filed Aug. 8, 1988)
OMAHA INDIAN TRIBE, Plaintiff, vs. AGRICULTURAL INDUSTRIAL INVESTMENT CO., et al., Defendants.	C 75-4067
OMAHA INDIAN TRIBE, Plaintiff, vs. AGRICULTURAL INDUSTRIAL INVESTMENT CO., et al., Defendants.	C 75-4067 *ORDER*

This matter is before the court on a resisted motion for partial summary judgment filed by Iowa Public Service Corporation (IPS) on March 17, 1977, (docket #100 in C75-4067), and on the Tribe's resisted motion to strike jury demand, filed March 10, 1976, in the consolidated cases (docket #120). Motions denied.[1]

IPS SUMMARY JUDGMENT MOTION

It appears that the land which is the subject of the instant motion is in the Omaha Mission Bend area, and is now in the possession of IPS (or its tenants). IPS asserts that the Tribe's claim is based upon an avulsive river movement having taken place in the Omaha Mission Bend area. IPS contends the Tribe has no material facts to support its claim that an avulsion occurred.

"Summary judgment is appropriate only when there is *no* genuine issue of material fact, so that the dispute may be decided upon purely legal grounds." *Agristor Leasing v. Farrow,* 826 F.2d 732, 734 (8th Cir. 1987) (emphasis in original), citing *Holloway v. Lockhart,* 813 F.2d 874, 878 (8th Cir. 1987).

The briefest review of the history of this litigation demonstrates that the Tribe's case is based upon the nature of past movements of the Missouri River, and the

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[1] Pursuant to the court's order of June 15, 1987, IPS renewed its summary judgment motion on September 16, 1987, (docket #130 in C75-4067), and it is therefore properly before the court. On April 5, 1976, the court reserved ruling on the Tribe's motion to strike jury demand as it pertains to the remaining portion of this litigation, and the court herein resolves that issue.

geophysical and legal effect of that movement. As is plain from the legal history of this matter, a sharp factual dispute is presented from river morphologists' analyses of topographical features left in the wake of river movement. The topography itself is evidence. The motion shall be denied.

MOTION TO STRIKE JURY DEMAND

As this case now stands, the remaining issues are 1) the Tribe's claim to land not now in its possession, and 2) the Tribe's claim for damages from the defendants' alleged trespass upon that land.[2]

When first made in 1976, the Tribe's motion was predicated upon its characterization of this matter as a quiet title action, historically an equitable matter to which there is no constitutional right to jury trial. However, and as noted above, it is uncontested that the Tribe is not in possession of any of the remaining land in this matter, and accordingly this case is an action to recover real property, or an ejectment action. Thus characterized, the only issues presented are legal in nature, and therefore a

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[2] On April 5, 1976, the Tribe's claim for damages was severed from the consolidated cases. On April 11, 1986, and in accordance with the suggestion of the Court of Appeals in *Omaha III*, 707 F.2d 304, 312 n.1 (8th Cir. 1983), the court rejoined the damage issue in the consolidated cases so as to resolve all matters regarding the Barrett Survey area. The Tribe's claim for damages in the Barrett Survey area was dismissed with prejudice on December 1, 1986, as a sanction for noncompliance with the court's order of November 17, 1986.

jury trial is clearly warranted. *See Pernell v. Southall Realty,* 416 U.S. 363, 374-376 (1974).

As a final matter, on July 20, 1988, the court noted that Mr. John O'Brien had not yet complied with the court's order of June 3, 1988, which directed him to pay over the Rupp-Weaver funds to the Clerk of Court. It has now come to the court's attention that through inadvertence Mr. O'Brien was not on the service list maintained by the Clerk's Office and therefore never received a copy of the court's June 3, 1988 order. The court regrets this oversight. The Clerk's records show that Mr. O'Brien paid over the funds on August 1, 1988, and he is therefore in compliance.

It is therefore

ORDERED

1. IPS motion for summary judgment denied.

2. Tribe's motion to strike jury demand denied.

August 8, 1988.

/s/ Edward J. McManus
Edward J. McManus, Judge
UNITED STATES DISTRICT COURT